

EXCELSIOR DRAFT

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

10 AMERICO J. VARGAS, ) No. C 12-0268 RMW (PR)  
11 Petitioner, ) ORDER GRANTING LEAVE TO  
12 vs. ) PROCEED IN FORMA  
13 ) PAUPERIS; ORDER TO SHOW  
14 WARDEN P. BRAZELTON, ) CAUSE  
15 Respondent. ) (Docket No. 2)

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17 Petitioner, a state prisoner proceeding pro se, seeks a writ of habeas corpus pursuant to  
18 28 U.S.C. § 2254. Petitioner's application to proceed in forma pauperis is GRANTED. The  
19 court orders respondent to show cause why a writ of habeas corpus should not be granted.  
20

**BACKGROUND**

21 According to the petition, in 2005, a Santa Clara Court jury convicted petitioner of  
22 attempted murder, corporal injury to a spouse, and assault. The trial court sentenced petitioner to  
23 a term of fifteen years plus twenty-five years to life. In 2006, the California Court of Appeal  
24 affirmed, and the California Supreme Court denied review. Petitioner filed unsuccessful state  
25 habeas petitions in all three levels of state court. Petitioner filed the instant federal petition on  
26 January 18, 2012.  
27  
28

## DISCUSSION

#### **A. Standard of Review**

This court may entertain a petition for writ of habeas corpus “in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a); Rose v. Hodges, 423 U.S. 19, 21 (1975).

A district court shall “award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.” 28 U.S.C. § 2243.

**B. Petitioner's Claims**

As grounds for federal habeas relief, petitioner raises two claims. First, petitioner argues that, even though the California Supreme Court denied his state habeas petition based on In re Robbins, 18 Cal. 4th 770 (1998), his claim should not be barred by procedural default. However, this is not a cognizable claim for federal habeas review. “[I]t is only noncompliance with federal law that renders a State’s criminal judgment susceptible to collateral attack in the federal courts.” Wilson v. Corcoran, 131 S. Ct. 13, 16 (2010) (emphasis in original). The Supreme Court has repeatedly held that federal habeas writ is unavailable for violations of state law or for alleged error in the interpretation or application of state law. See Swarthout v. Cooke, 131 S. Ct. 859, 861-62 (2011). In other words, it is unavailable for any alleged errors in the state post-conviction review process, such as the one petitioner asserts. See Franzen v. Brinkman, 877 F.2d 26, 26 (9th Cir. 1989). Accordingly, petitioner’s first claim is DISMISSED.

Second, petitioner claims that his conviction is based on perjured testimony, in violation of the Fourteenth Amendment. Liberally construed, this allegation is sufficient to require a response. The court orders respondent to show cause why the petition should not be granted.

## CONCLUSION

1. Petitioner's motion for leave to proceed in forma pauperis is GRANTED. The clerk shall serve by mail a copy of this order and the petition (docket no. 1) and all attachments thereto upon the respondent and the respondent's attorney, the Attorney General of the State of

1 California. The clerk shall also serve a copy of this order on the petitioner.

2       2. Respondent shall file with the court and serve on petitioner, within **ninety days** of  
3 the date this order is filed, an answer conforming in all respects to Rule 5 of the Rules Governing  
4 Section 2254 Cases, showing cause why a writ of habeas corpus should not be granted.  
5 Respondent shall file with the answer and serve on petitioner a copy of all portions of the  
6 underlying state criminal record that have been transcribed previously and that are relevant to a  
7 determination of the issues presented by the petition.

8       If petitioner wishes to respond to the answer, he shall do so by filing a traverse with the  
9 court and serving it on respondent within **thirty days** of the date the answer is filed.

10      3. Respondent may file a motion to dismiss on procedural grounds in lieu of an  
11 answer, as set forth in the Advisory Committee Notes to Rule 4 of the Rules Governing Section  
12 2254 Cases within **ninety days** of the date this order is filed. If respondent files such a motion,  
13 petitioner shall file with the court and serve on respondent an opposition or statement of non-  
14 opposition within **thirty days** of the date the motion is filed, and respondent **shall** file with the  
15 court and serve on petitioner a reply within **fifteen days** of the date any opposition is filed.

16      4. It is petitioner's responsibility to prosecute this case. Petitioner is reminded that  
17 all communications with the court must be served on respondent by mailing a true copy of the  
18 document to respondent's counsel. Petitioner must keep the court and all parties informed of any  
19 change of address by filing a separate paper captioned "Notice of Change of Address." He must  
20 comply with the court's orders in a timely fashion. Failure to do so may result in the dismissal  
21 of this action for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).

22           IT IS SO ORDERED.

23 DATED: 1 DFG

  
RONALD M. WHYTE  
United States District Judge

UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

AMERICO JOSE VARGAS SR.,

Case Number: CV12-00268 RMW

Plaintiff,

**CERTIFICATE OF SERVICE**

v.

P. BRAZELTON et al,

Defendant.

/

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on June 5, 2012, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Americo J Vargas V-82325  
D-2-135UP  
PVSP  
PO Box 8500  
Coalinga, CA 93210

Dated: June 5, 2012

Richard W. Wieking, Clerk  
By: Jackie Lynn Garcia, Deputy Clerk